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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL TURQUAND KEYSER, MICHAEL PETER PERRONE,
EUGENE H. RATZLAFF, and JAYASHREE SUBRAHMONIA

Appeal 2009-000952
Application 09/624,963
Technology Center 2100

Decided: September 18, 2009

Before HOWARD B. BLANKENSHIP, JOHN A. JEFFERY, and
ST. JOHN COURTENAY III, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1-4, 11, 19, and 23-25. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellants invented a method for providing automatic page break detection in personal digital notepads so that the correspondence between

“electronic ink” in pages of electronic documents is maintained as closely as possible to physical ink on corresponding paper pages.¹ Claim 1 is illustrative:

1. A computer-based method of processing an electronic document generated in accordance with a handwriting system, the method comprising the steps of:

obtaining electronic ink data from the handwriting system, the ink data being associated with the electronic document; and

automatically identifying, using at least a portion of the electronic ink data, one or more potential page breaks for possible insertion in the electronic document to maintain a page correspondence between the electronic document and a physical document also generated in accordance with the handwriting system, and so as to at least partially reduce asynchrony between an electronic page and a physical page.

The Examiner relies on the following as evidence of unpatentability:

Mishra	US 5,805,118	Sept. 8, 1998
Ruedisueli	US 5,838,819	Nov. 17, 1998
Nakai	US 5,909,221	June 1, 1999
Johari	US 5,911,146	June 8, 1999
Michelman	US 6,128,633	Oct. 3, 2000 (filed Mar. 25, 1997)
Forcier	US 6,502,114 B1	Dec. 31, 2002 (filed Oct. 19, 1998)

1. The Examiner rejected claims 1-4, 24, and 25 under 35 U.S.C.

§ 103(a) as unpatentable over Michelman and Ruedisueli. Ans. 3-6.

¹ See generally Abstract; Spec. 1-4.

2. The Examiner rejected claim 11 under 35 U.S.C. § 103(a) as unpatentable over Michelman, Ruedisueli, Forcier, and Johari. Ans. 6-7.
3. The Examiner rejected claim 19 under 35 U.S.C. § 103(a) as unpatentable over Michelman, Ruedisueli, and Mishra. Ans. 7-8.
4. The Examiner rejected claim 23 under 35 U.S.C. § 103(a) as unpatentable over Michelman, Ruedisueli, Forcier, Nakai, and Johari. Ans. 8-9.

Rather than repeat the arguments of Appellants or the Examiner, we refer to the Briefs and the Answer² for their respective details. In this decision, we have considered only those arguments actually made by Appellants. Arguments which Appellants could have made but did not make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

² Appellants indicate that they incorporate by reference “the disclosure of all previous responses filed in the present application, including responses dated January 12, 2004; July 6, 2004 and January 11, 2007, as well as the previously-filed Supplemental Appeal Brief dated May 8, 2006 and the Reply Brief dated August 14, 2006.” App. Br. 5. Such incorporations by reference, however, are improper under current practice. *See* MPEP § 1205.02 (“It is essential that the Board be provided with a brief fully stating the position of the appellant with respect to each ground of rejection presented for review in the appeal so that no search of the record is required in order to determine that position.”). As such, Appellants’ Briefs should not incorporate or reference previous responses. *Id.* Accordingly, we refer to (1) the latest Appeal Brief filed August 6, 2007; (2) the Examiner’s Answer mailed October 16, 2007; and (3) the Reply Brief filed December 17, 2007.

THE OBVIOUSNESS REJECTION OVER MICHELMAN AND RUEDISUELI

Regarding representative claim 1,³ the Examiner finds that Michelman discloses a system for manipulating page breaks in an electronic document but does not obtain data from a handwriting system. The Examiner, however, cites Ruedisueli for teaching this feature in concluding the claim would have been obvious. Ans. 3-5. According to the Examiner, applying Ruedisueli's electronic notepad functionality to Michelman would benefit Michelman by, among other things, providing the ability to input and manage handwritten electronic documents using the disclosed automatic page break capabilities. Ans. 9-13.

Appellants argue that there is no motivation to combine the references as the Examiner proposes since the references are directed to completely different environments, (1) namely word processing and spreadsheet applications (Michelman), and (2) handwritten note processing systems (Ruedisueli). According to Appellants, the Examiner not only fails to show why skilled artisans would have modified Michelman with Ruedisueli's handwriting system (App. Br. 5-7; Reply Br. 5-8), but the Examiner has not shown that skilled artisans would have reasonably expected success if the references were so combined (App. Br. 7-8).

Lastly, Appellants argue that the cited prior art does not teach or suggest automatically identifying one or more potential page breaks as claimed since, among other things, Michelman's technique operates after the

³ Appellants argue claims 1-4, 24, and 25 together as a group. *See* App. Br. 5-12. Accordingly, we select claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(vii).

user manually selects a page break within the electronic document, and then manually identifies a new location for the page break. App. Br. 8-12; Reply Br. 2-5. Appellants add Ruedisueli also falls short in this regard since the page identifiers in the upper right corner are likewise manually entered. Reply Br. 4.

The issues before us, then, are as follows:

ISSUES

(1) Under § 103, have Appellants shown that the Examiner erred in rejecting claim 1 by finding that Michelman and Ruedisueli collectively teach or suggest automatically identifying, using at least a portion of the electronic ink data, one or more page breaks for possible insertion in an electronic document to maintain a page correspondence between the electronic document and a physical document as claimed?

(2) Is the Examiner's reason to combine the teachings of these references supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion?

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence:

Michelman

1. Michelman discloses a system for manipulating page breaks in an electronic document including two main processes: (1) a "User Interface Process," and (2) a "System Process." The User Interface Process allows a user to select a page break within the document via a graphical user

interface, and identify a new location for the page break. The System Process moves the selected page break to the new location and adjusts the scaling and the automatic page breaks for the remainder of the document to accommodate the page break at the new location. Michelman, Abstract; col. 6, ll. 10-22; col. 8, l. 63 – col. 9, l. 10.

2. Figures 2a and 2b illustrate the relationship between the System Process and the User Interface Process. A typical worksheet in Figure 2b displays manual page breaks as solid lines, and automatic page breaks as dashed lines. Upon moving the page break 214 and releasing the mouse button, the System Process is invoked. Michelman, col. 9, l. 10 – 10, l. 57; Figs. 2a, 2b.

3. After performing the various steps of the System Process including adjusting the scaling factor responsive to moving the page break, (1) the automatic page breaks 216 and 218 are removed, and (2) the new automatic page breaks 224 and 226 are entered. Michelman, col. 10, l. 55 – col. 13, l. 51; Figs. 2a, 2b, 3.

4. Michelman's invention can be used in any type of document processing application including, among other things, project planners and drawing programs. Michelman, col. 13, ll. 54-60.

5. Michelman notes that Microsoft Word and Excel support automatic page breaks that are automatically inserted by the document processing program at page boundaries. Thus, as information is entered into or deleted from a document, the program automatically identifies page boundaries and places automatic page breaks accordingly. Michelman, col. 2, ll. 51-59.

Ruedisueli

6. Ruedisueli notes that one type of electronic notepad provides for both a standard ink and paper copy as well as an electronic copy, with actual paper positioned over a handwriting capturing device. One difficulty with these devices, however, is that when the user intends to position a new sheet of paper on the tablet, the electronic notepad must be instructed when to (1) close or end the current electronic page, and (2) open or create a new page. Ruedisueli, col. 1, ll. 29-45.

7. Ruedisueli's system processes and manages electronic copies of handwritten notes. The system includes an electronic notepad 10 that electronically captures handwritten notes 28 written on a sheet of paper 30 using pen 34. Ruedisueli, Abstract; col. 3, ll. 41-46; Figs. 1-3.

8. The user controls the management of electronically captured pages by marking the upper right corner of the handwritten page 30 with identifier 36. This identifier is then captured as an electronic identifier on the electronic page. The writing in the upper right corner can act as an indicator to electronic notepad 10 to generate a successive number or letter such as "1," "2," etc. to establish an order between stored electronic pages. Ruedisueli, col. 4, ll. 5-14, 39-67; Fig. 2.

9. Notes 28 are then written for electronic storage and association with the identifier. In one implementation, the user first writes the numeral "1" in the upper right corner of a blank page 48. Then, notes 50 are written on page 48 outside the upper right corner and are stored progressively in memory 16. After changing to the next sheet 52 of paper, the user writes a new identifier 54 (e.g., the numeral "2") in the upper right corner to indicate a page change. Thus, pre-entry identification is supported, with each page

identified initially, and new writing in the upper corner signalling electronic notepad 10 of a new page of handwritten notes. Ruedisueli, col. 4, ll. 14-16; col. 5, ll. 12-32; Figs. 3, 5(a)-5(c).

10. In another embodiment, electronic notepad 10 can automatically generate an identifier for an entire electronic page responsive to the user specifying specific locations in the electronic copy. Ruedisueli, col. 5, ll. 40-65; Figs. 7(a)-7(c).

11. In one embodiment, electronic notepad 10 can store electronic pages in a single data file corresponding to respective pages of written notes with the data file generated as the notes are written on paper 30 positioned on the electronic notepad. Although all electronic pages are stored in a single data file, each electronic page can be stored in a respective single data file. Ruedisueli, col. 9, ll. 14-28; Fig. 9.

12. The electronic notepad can therefore provide the electronic pages and associated identifiers to computer system 100 that manages the various electronic pages including, among other things, maintaining an order of the electronic pages corresponding to the order of the written notes. Ruedisueli, col. 9, ll. 35-45; Fig. 9.

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). If the Examiner's burden is met, the burden then shifts to the Appellants to

overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

To be patentable under § 103, an improvement must be more than the predictable use of prior art elements according to their established functions. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

“[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *Id.*

Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.

In re Bigio, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

“‘Comprising’ is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.” *Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501 (Fed. Cir. 1997) (citation omitted).

ANALYSIS

Based on the record before us, we find no error in the Examiner's obviousness rejection of representative claim 1. At the outset, we note that claim 1 calls for, in pertinent part, automatically identifying, *using* at least a portion of the electronic ink data, one or more *potential* page breaks for *possible* insertion in the electronic document to maintain a page correspondence between the electronic document and a physical document. We emphasize the term "using" since the claim does not further specify how at least a portion of the electronic ink data is used in this automatic identification. Furthermore, identifying one or more *potential* page breaks for *possible* insertion into the document does not require actually inserting a page break into the document, but rather identifying a *potential* page break that may or may not be inserted into the document.

Turning to the prior art, we note that while it is undisputed that Michelman does not explicitly disclose a handwriting system, we nonetheless find no error in the Examiner's combining Michelman with Ruedisueli to arrive at the claimed invention. Michelman pertains to a processing system that manipulates page breaks within electronic documents—manipulation that includes automatic page breaks. FF 1-3. We see no reason why the pages and their associated content in Michelman could not include at least some information obtained from a handwriting system such as that disclosed by Ruedisueli (FF 6-12), particularly since Ruedisueli's system manages electronic copies of handwritten notes on a page-by-page basis (FF 6, 9, 10-12). That Michelman indicates that the disclosed page break manipulation technique can be used in *any* type of document processing application including project planners and *drawing*

programs (FF 4; emphases added) only bolsters our conclusion that skilled artisans could have reasonably utilized Michelman's system in connection with pages with electronic ink data obtained from a handwriting system such as that disclosed by Ruedisueli.

Since both Michelman and Ruedisueli pertain to document processing applications, they are in the same field of endeavor and therefore constitute analogous art. *See Bigio*, 381 F.3d at 1325. Moreover, extending Michelman's capabilities to include pages with electronic ink data obtained via a handwriting system would have been tantamount to the predictable use of prior art elements according to their established functions—an obvious improvement. *See KSR*, 550 U.S. at 417; *see also id.* (“[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.”). Also, there is no evidence on this record proving that skilled artisans would not reasonably expect success if the references were so combined. We therefore find that the Examiner's reason to combine the teachings of these references supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion.

We also find that the references reasonably teach or suggest automatically identifying, using at least a portion of the electronic ink data, one or more potential page breaks for possible insertion in the electronic document to maintain a page correspondence between the electronic document and a physical document as claimed.

Although claim 1 recites *automatically* identifying one or more potential page breaks to maintain a page correspondence, the claim does not preclude a process that includes both manual and automatic steps in achieving this end. That the preamble of the claim uses the open-ended term “comprising” only reinforces this interpretation. *See Genentech, Inc. v. Chiron Corp.*, 112 F.3d at 501.

Therefore, despite the presence of manual steps in Michelman, such as moving the page break 214 to a new location (FF 2), Michelman nonetheless automatically identifies and positions automatic page breaks responsive to this manual operation. *See* FF 3. As such, at least a portion of the electronic document data is used in this automatic page break identification process. Moreover, it is well known that as information is entered into or deleted from a document, programs such as Microsoft Word and Excel automatically identify page boundaries and place automatic page breaks accordingly. FF 5. Here again, the electronic document data is used, at least in part, in this automatic page break identification and placement process.

We see no reason why this technique could not be utilized in connection with a paginated electronic document generated via a handwriting system such as Ruedisueli. Notably, Ruedisueli notes that when the user intends to position a new sheet of paper on a tablet of electronic notepad, the electronic notepad must be instructed when to (1) close or end the current electronic page, and (2) open or create a new page. FF 6. This instruction at least suggests identifying a potential page break. Moreover, we see no reason why a user could not use an actual page break to achieve this end in light of Michelman.

In any event, the user in Ruedisueli can control the management of electronically captured pages via a page identifier that is distinct from the handwritten notes on that page. FF 8-9. Not only does this identifier inform the electronic notepad of a new page of notes, the identifier is also used to, among other things, maintain the order of the electronic pages consistent with the written notes. FF 9-12. By indicating distinct pages corresponding to the handwritten pages and their electronic equivalents, these identifiers at least suggest using at least some of the electronic ink data to automatically identify potential page breaks in the electronic document that correspond to the pages in the paper document. *See id.* That Ruedisueli teaches that the handwriting indicated in the upper right corner can be used to generate a successive number or letter to establish an order between stored electronic pages (FF 8) only bolsters this conclusion.

Although this identifier is manually entered on the handwritten pages, it is nevertheless captured as an electronic identifier on the corresponding electronic pages and subsequently used to automatically identify the respective pages. *See* FF 8-12. As such, nothing in the claim precludes this automatic functionality, notwithstanding the user's initial involvement.

For the foregoing reasons, Appellants have not persuaded us of error in the Examiner's rejection of representative claim 1. Therefore, we will sustain the Examiner's rejection of that claim, and claims 2-4, 24, and 25 which fall with claim 1.

THE OBVIOUSNESS REJECTION OVER MICHELMAN, RUEDISUELI, FORCIER,
AND JOHARI

Regarding claim 11, the Examiner relies on Johari as teaching a confidence measure for the potential page break associated with the possible insertion point. Ans. 6-7. Appellants argue that Johari's teaching of a commercial telephone directory is not properly combinable with Michelman and Ruedisueli and, even if they were combined, an advertisement stream page break is not the same as the claimed feature. App. Br. 12-13.

The issues before us, then, are as follows:

ISSUES

1) Under § 103, have Appellants shown that the Examiner erred in rejecting claim 11 by finding that Michelman, Ruedisueli, and Johari collectively teach or suggest determining a confidence measure for the potential page break associated with the possible insertion point as claimed?

(2) Is the Examiner's reason to combine the teachings of these references supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion?

FINDINGS OF FACT

The record supports the following additional findings of fact (FF) by a preponderance of the evidence:

Johari

13. Johari discloses a system that automatically paginates and lays out yellow pages of a commercial telephone directory. The system uses a heuristic approach known as "simulated annealing" to refine a randomly-

determined candidate solution which is scored based on certain format and layout guidelines. A modification or perturbation is made in the candidate solution such that a randomly-selected change is made to a value in the candidate solution (e.g., a page break in the advertisement stream can be changed by randomly selecting a page break to insert or delete). Johari, Abstract; col. 6, ll. 16-24; Fig. 3.

14. After modification, the new candidate solution is decoded and scored. Johari, col. 6, ll. 37-39.

ANALYSIS

Based on the record before us, we see no error in the Examiner's rejection of claim 11 which relies on Johari for teaching determining a confidence measure for the potential page break. Johari automatically paginates a yellow page directory using a heuristic technique that scores a "candidate solution" based on certain format and layout guidelines. FF 13. The candidate solution is then modified by a randomly-selected change that can include a randomly selected page break in the advertisement stream. *Id.* Since this modification involves a page break which is then used as a basis to score the resulting candidate solution (FF 14), Johari at least suggests using some sort of metric to evaluate page breaks. We see no reason why such a metric-based evaluation would not at least suggest determining a confidence measure as claimed. Moreover, since Johari pertains to pagination and layout of a document (i.e., a directory), we see no reason why its teachings could not be combined with Michelman and

Ruedisueli. The Examiner's reason to combine the teachings of these references is therefore supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion.

For the foregoing reasons, Appellants have not persuaded us of reversible error in the Examiner's rejection of claim 11. Therefore, we will sustain the Examiner's rejection of that claim.⁴

THE OBVIOUSNESS REJECTION OVER MICHELMAN, RUEDISUELI, AND MISHRA

Regarding claim 19, the Examiner relies on Mishra as teaching using a learning algorithm. Ans. 7-8. Appellants argue that Mishra's teaching of a display protocol specification is not properly combinable with Michelman and Ruedisueli and, even if they were combined, the fact that Mishra mentions a learning algorithm does not mean that Michelman discloses the claimed feature. App. Br. 14-15.

The issues before us, then, are as follows:

ISSUES

(1) Under § 103, have Appellants shown that the Examiner erred in rejecting claim 19 by finding that Michelman, Ruedisueli, and Mishra collectively teach or suggest using a learning algorithm as claimed?

⁴ Although the Examiner cites Forcier in this rejection but does not discuss its relevance to the rejection (*see* Ans. 6-7), we nonetheless find the Examiner's reliance on Forcier merely cumulative to the teachings of Michelman, Ruedisueli, and Johari.

(2) Is the Examiner's reason to combine the teachings of these references supported by articulated reasoning with some rational underpinning to justify the Examiner's obviousness conclusion?

FINDINGS OF FACT

The record supports the following additional findings of fact (FF) by a preponderance of the evidence:

Mishra

15. Mishra discloses a method for displaying and managing a set of images that, among other things, assigns image sets to different workspaces. Mishra, Abstract.

16. To this end, Mishra uses a display protocol specification and learning algorithm. Mishra, col. 8, l. 4.

17. The display protocol specification algorithm enables the user to indicate what the display(s) should look like during the session, per session type, and creates a prototype for image navigation for that session type. Mishra, col. 19, ll. 1-5.

ANALYSIS

We will sustain the Examiner's rejection of claim 19 which relies on Mishra for the recited learning algorithm. Mishra discloses a method for displaying and managing a set of images that, among other things, assigns image sets to different workspaces. FF 15. To this end, Mishra uses a display protocol specification and learning algorithm which enables the user to indicate what the display should look like as well as create an image navigation prototype. FF 16-17.

Based on these teachings, we see no reason why skilled artisans could not use a learning algorithm in the system of Michelman and Ruedisueli to obtain the benefits of such algorithms, including, among other things, adaptation to user preferences. *See* FF 16-17. Such a feature is tantamount to the predictable use of prior art elements according to their established functions—an obvious improvement. *See KSR*, 550 U.S. at 417. The Examiner’s reason to combine the teachings of these references is therefore supported by articulated reasoning with some rational underpinning to justify the Examiner’s obviousness conclusion.

For the foregoing reasons, Appellants have not persuaded us of error in the Examiner’s rejection of claim 19. Therefore, we will sustain the Examiner’s rejection of that claim.

THE OBVIOUSNESS REJECTION OVER MICHELMAN, RUEDISUELI, FORCIER,
NAKAI, AND JOHARI

We will also sustain the Examiner’s rejection of claim 23 which calls for, in pertinent part, identifying a potential page break as a point offset from a potential insertion point in accordance with a scoring procedure. The Examiner relies on Johari’s scoring technique for this feature (Ans. 8, 9, 13, and 14)—a reliance that we find reasonable on the record before us.

As we noted previously, Johari’s automatic pagination and layout system uses a heuristic approach known as “simulated annealing” to refine a randomly-determined candidate solution which is scored based on certain format and layout guidelines. FF 13. After modification, a new candidate solution is decoded and scored. FF 14. We see no reason why a commensurate scoring technique could not be used to identify a potential

page break in the Michelman/Ruedisueli system, particularly since Michelman reasonably pertains to layout and pagination of documents. *See* FF 1-5. Such a feature is tantamount to the predictable use of prior art elements according to their established functions—an obvious improvement. *See KSR*, 550 U.S. at 417. The Examiner’s reason to combine the teachings of these references is therefore supported by articulated reasoning with some rational underpinning to justify the Examiner’s obviousness conclusion.

For the foregoing reasons, Appellants have not persuaded us of reversible error in the Examiner’s rejection of claim 23. Therefore, we will sustain the Examiner’s rejection of that claim.⁵

CONCLUSION

Appellants have not shown that the Examiner erred in rejecting claims 1-4, 11, 19, and 23-25 under § 103.

ORDER

The Examiner’s decision rejecting claims 1-4, 11, 19, and 23-25 is affirmed.

⁵ Although the Examiner cites Forcier and Nakai in this rejection but does not discuss their relevance to the rejection (*see* Ans. 8-9), we nonetheless find the Examiner’s reliance on these references merely cumulative to the teachings of Michelman, Ruedisueli, and Johari.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

pgc

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